

Catholic University Law Review

Volume 30
Issue 3 *Spring 1981*

Article 7

1981

Federal Preemption: State Strikebreaking Laws and the National Labor Policy

Frank Martorana

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Frank Martorana, *Federal Preemption: State Strikebreaking Laws and the National Labor Policy*, 30 Cath. U. L. Rev. 521 (1981).

Available at: <https://scholarship.law.edu/lawreview/vol30/iss3/7>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

NOTES

FEDERAL PREEMPTION: STATE STRIKEBREAKING LAWS AND THE NATIONAL LABOR POLICY

The preemption doctrine, as applied to the national labor relations laws and, more generally, to national labor policy, has been a much litigated area.¹ The doctrine, based on the supremacy clause of the United States Constitution, provides that, where a conflict exists, state law must yield to the exercise of congressional authority.² Congress has exerted its authority over labor relations in three major statutes: the National Labor Relations Act of 1935 (NLRA);³ the Labor Management Relations Act of 1947 (LMRA),⁴ which amended and incorporated the NLRA;⁵ and Title VII of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).⁶ The enactment of these comprehensive federal labor-management relations laws indicates the recognition by Congress that the free flow of commerce requires a centralized regulatory scheme to ensure in-

1. See generally Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

2. The supremacy clause, found in U.S. CONST., art. VI, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supreme Court first addressed the issue of conflicting federal and state regulation in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), holding that federal legislation will prevail over state law when Congress has properly exercised its powers under the Constitution. The preemption doctrine has been advanced primarily through the exercise of commerce clause powers. See Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 52-53 (1973).

3. 29 U.S.C. §§ 151-166 (1976) (Wagner Act).

4. 29 U.S.C. §§ 141-144, 151-167, 171, 187 (1976) (Taft-Hartley Act).

5. For the purposes of this article, references to the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, will be cited as the LMRA or the "Act." References to the National Labor Relations Act alone will be cited as the NLRA.

6. 29 U.S.C. §§ 141, 153, 158-160, 164, 187 (1976) (Landrum-Griffith Act). Although this act amends sections of the LMRA, its primary purpose is the regulation of internal union affairs rather than union-management relations generally covered by the LMRDA. Section 164 of the LMRDA eliminates most preemption questions by providing that, except for a few expressly stated exceptions, state laws enjoy concurrent jurisdiction.

dustrial peace.⁷ Moreover, the creation of the National Labor Relations Board (NLRB),⁸ charged with enforcing the LMRA, is further recognition that a successful federal labor-management relations policy requires uniform interpretation and application of the labor laws.⁹ Accordingly, state law and state court jurisdiction in this field must often give way to federal exclusivity.¹⁰

The Supreme Court has decided labor preemption questions in such areas as state regulation of union picketing,¹¹ state tort claims,¹² and unemployment insurance for striking employees.¹³ The Court has attempted to establish rules applicable to classes of cases rather than reviewing each case on an *ad hoc* basis.¹⁴ The application of the preemption doctrine with its many exceptions, however, is rarely a simple task. As a result, there are areas in union-management affairs where states must act at their peril because their authority to legislate may be susceptible to attack.¹⁵ One such area is state regulation of efforts by employers to replace striking employees.

Strikebreaking laws¹⁶ have been enacted, in one form or another, in thirty states.¹⁷ Through these statutes, states have regulated employers and third parties who solicit and hire workers to replace strikers lawfully on strike. Few courts have grappled with the question of whether these statutes are subject to federal preemption. Those courts that have addressed the issue, however, have not looked favorably on this exercise of

7. See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 190-91 (1978). See also 29 U.S.C. § 141 (1976) (Findings and Policies).

8. 29 U.S.C. § 153 (1976).

9. See note 7 *supra*.

10. See *Cox*, *supra* note 1, at 1338-39.

11. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (states preempted in restraining peaceful union picketing).

12. See *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (states not preempted in granting damages for libelous statements made by a union agent during an organizing campaign); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (states not preempted in granting damages for loss of business due to union threats of violence).

13. See *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979) (states not preempted in paying unemployment benefits to striking employees).

14. *Farmer v. Carpenters Local 25*, 430 U.S. 290, 296 n.7 (1977); *Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 139 (1976); *Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289-90 (1971).

15. See generally *Smith & Clark, Reappraisal of the Role of the States in Shaping Labor Relations Law*, 1965 WIS. L. REV. 411.

16. The term "strikebreaker" connotes any person who replaces a striking employee by working in that striker's job. Strikebreaking laws refer to those laws regulating, in some form, the use of strikebreakers by employers. See [1974] LAB. REL. REP. (BNA), LRX 687.

17. See note 89 *infra*.

state authority. For example, in *Illinois v. Federal Tool & Plastics*,¹⁸ the Illinois Supreme Court applied the preemption doctrine to invalidate a state statute requiring an employer to advertise that a strike or lockout was in progress when soliciting replacement employees.¹⁹ The court reasoned that the right to hire replacements is an important economic weapon of an employer and that the state statute encumbers the employer's use of this weapon.²⁰ The Superior Court of New Jersey reached a similar result in its recent decision in *Chamber of Commerce v. New Jersey*.²¹ In this case, the plaintiff challenged the constitutionality of the New Jersey strikebreaking law prohibiting employers and third parties to a labor dispute from transporting within the state, or supplying from without the state, or otherwise recruiting persons to replace lawfully striking employees. The statute also prohibited third parties from recruiting any person to replace striking employees.²² The court held that such a law "affects the economic balance between employer and employee" and is thus preempted under the LMRA.²³

Despite these decisions, the absence of federal circuit court or Supreme Court decisions in this area renders it unsettled. Furthermore, the proliferation of state strikebreaker laws elevates the preemption issue to one of national concern and increases the likelihood of future challenges. This Note will review the decisions that have shaped the preemption doctrine in the labor field. It will then analyze the doctrine's possible effects on three categories of strikebreaking laws: restrictions on employer recruiting and

18. 62 Ill. 2d 549, 344 N.E.2d 1 (1975).

19. Act of July 16, 1941, § 1, ILL. REV. STAT. ch. 48, § 2(c), (d) (1971). Section 2(c) provides: "No employer shall advertise seeking to hire employees to replace employees on strike or locked out during any period when a strike or lockout is in progress . . . unless it shall be stated in such advertisement that a strike or lockout is in progress at such place of business."

20. 62 Ill. 2d at 554, 344 N.E.2d at 4.

21. No. L-21147-79 (N.J. Super. Ct., June 13, 1980) (oral decision), *appeal docketed*, No. A-4767-79-T1 (App. Div. 11, 1980).

22. N.J. STAT. ANN. § 34:13 C-1, 2, 3, (West 1965). Section 34:13 C-1 provides in part:

It shall be unlawful for any person, firm, partnership or corporation to import from outside the boundaries of the State of New Jersey or to transport within the State of New Jersey or to supply from without the State any person or persons for the purpose of being or becoming employed with an object of:

. . . .

c) replacing in employment any employees of any employer who are lawfully on strike or who have been locked out.

Section 34:13 C-2 provides in pertinent part: "It shall be unlawful for any person, firm or corporation not directly involved in a strike or lockout, to recruit any person or persons for employment"

23. *Chamber of Commerce v. New Jersey*, No. L-21147-49, slip op. at 48 (N.J. Super. Ct. June 13, 1980).

hiring of replacements; restrictions on third party soliciting and recruiting of replacements; and requirements that employers and third parties give notice of a strike or lockout to replacements.²⁴ This examination will demonstrate that those strikebreaking laws falling within the first two categories cannot survive the preemption test and therefore must fall. Those statutes requiring an employer or third party to give notice of a labor dispute, however, are legitimate exercises of state police powers and should not be preempted by federal labor laws.

I. THE DEVELOPMENT OF THE PREEMPTION DOCTRINE TO SECURE A NATIONAL LABOR POLICY

The Supreme Court has recognized two lines of preemption in the labor field.²⁵ The first line was developed in *Garner, Central Storage & Transfer Co. v. Teamsters Local 776*,²⁶ expanded in *San Diego Building Trades Council Local 2020 v. Garmon*,²⁷ and modified in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.²⁸ The recently articulated second line was announced in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*.²⁹ An understanding of both lines provides a framework for all preemption analysis in labor law.

A. *Garner-Garmon-Sears: Conduct Protected and Prohibited Under the Act*

Conduct clearly or arguably regulated by the LMRA falls within the primary jurisdiction of the NLRB and comprises the first line of preemption. The Court expounded the first stage of this theory in *Garner, Central Storage*. The union had placed picketers at the employer's place of business in an attempt to organize the employees. The employer claimed this was an unfair labor practice in violation of Pennsylvania law.³⁰ The Pennsylvania Supreme Court, reversing the lower court, held that the state law

24. See notes 94-97 and accompanying text *infra*.

25. *Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. at 138.

26. 346 U.S. 485 (1953).

27. 359 U.S. 236 (1959).

28. 436 U.S. 180 (1978).

29. 427 U.S. 132 (1976).

30. 346 U.S. at 486-87. An unfair labor practice is defined under the LMRA as employer or labor organization conduct which is specifically proscribed under Section 8 of the Act. 29 U.S.C. § 158 (1976). The Pennsylvania statute defines the term similarly. PA. STAT. ANN. tit. 43, § 211.2, 211.6 (Purdon 1964).

was preempted.³¹ The United States Supreme Court agreed, holding that the NLRB had sole power to act in the controversy since the conduct fell either under the protection of section 7³² or the prohibition of section 8³³ of the LMRA.³⁴

This line of preemption continued in *Garmon*, where the employer sought, under California law, both an injunction to restrain peaceful union picketing by employees to gain union recognition and damages for loss of business. The California Supreme Court had granted both remedies, but the United States Supreme Court remanded for consideration in the light of its recent decisions.³⁵ On reconsideration, the California court set aside the injunction while sustaining the damages.³⁶ Granting certiorari a second time, the United States Supreme Court, dismissing any distinction between remedies,³⁷ held that since it was unclear whether the union conduct was protected or prohibited, the better course was to preempt the state court as a tribunal of primary jurisdiction.³⁸ The *Garmon* decision ex-

31. *Garner, Central Storage Co. v. Teamsters Local 776*, 373 Pa. 19, 94 A.2d 893 (1953).

32. 29 U.S.C. § 157 (1976). "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . and shall also have the right to refrain from any or all of such activities." *Id.*

33. 29 U.S.C. § 158 (1976). This section enumerates examples of prohibited conduct considered to be unfair labor practices. Paragraph (a) lists employer unfair labor practices, proscribing, for example, interference with employees in the exercise of their rights under section 7, domination or interference with the formation or administration of a union, and bad faith bargaining. Paragraph (b) lists union unfair labor practices, proscribing, for example, interference with employees in the exercise of their rights and bad faith bargaining.

34. *See* 346 U.S. at 489. The Court rejected *Garner's* contention that the NLRB enforces only public rights and that the instant action concerned private rights. It held that the conflict lay in remedies, not rights, and if separate remedies were brought to bear, they could cause conflict. *Id.* at 498-99.

35. The recent Supreme Court decisions were *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957) and *Meat Cutters v. Firlawn Meats, Inc.*, 353 U.S. 20 (1957). These decisions held that "the refusal of the National Labor Relations Board to assert jurisdiction did not leave with the States power over activities they otherwise would be preempted from regulating." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 238 (1959). *But see* note 40 *infra*.

36. *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 320 P.2d 473 (1958). The California court had based its decision on a combination of state tort law and labor law, holding that the picketing was a tort since picketing was an unfair labor practice under state law. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 239.

37. "Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." 359 U.S. at 243.

38. *Id.* at 246. The federal labor laws were passed because of the "perceived incapacity of the common-law courts and state legislatures" to apply informed and consistent rules and because of the need for a centralized policy to balance labor and management. *Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286.

panded *Garner*, *Central Storage* by acknowledging not only that activities clearly protected and prohibited by the LMRA are the exclusive province of the NLRB, but also that those activities *arguably* protected by section 7 or prohibited by section 8 are likewise within the Board's primary jurisdiction.³⁹ The states must defer to the Board's determination of whether the conduct challenged is actually protected or prohibited.⁴⁰ State regulation of areas potentially subject to federal law, in the Court's view, would create serious conflicts in the application of a national labor policy.⁴¹ The *Garmon* principle stood unscathed for nineteen years.⁴²

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, the Court narrowed the preemption theory constructed in *Garner*, *Central Storage* and *Garmon*. Like *Garmon*, the case involved peaceful picketing on the employer's property, and the employer sought an injunction in state court to restrain the trespass.⁴³ The Supreme Court, in a retreat from its previous decisions, held that the *Garmon* principle could not be applied woodenly lest it sweep too broadly by usurping state court jurisdiction over traditionally local matters.⁴⁴ The Court first examined

39. 359 U.S. at 245. "When an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.*

40. *Id.* The Court also noted that the fact that the Board declined to assert jurisdiction over the dispute did not affect the preemption analysis. If the activity was protected or prohibited, a state could not interject itself regardless of the Board's refusal to decide the dispute. *Id.* at 245-46. The effect of this decision, which left the parties without a forum in which to litigate, was alleviated that same year with the passage of the LMRDA, which permitted state and federal courts to assert jurisdiction when the Board had declined. 29 U.S.C. § 164(c)(2) (1976).

41. 359 U.S. at 246.

42. The *Garmon* rule evolved from judicial trial and error and represents the best rule that can be applied easily and consistently by the courts. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. at 216 (Brennan, J., dissenting). The Court traced this evolution in *Lodge 76*, 427 U.S. at 138-39. First, the Court posited that the distinction lay between general state common law and specific state legislation directly regulating labor-management relations. *United Auto., Aircraft & Agricultural Implement Workers v. Russell*, 356 U.S. 634, 645 (1958). A second approach was to refuse to preempt when the state applied a remedy not available under federal law. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479-80 (1955). The third approach was a case-by-case determination of whether the state court actually arrived at a conclusion inconsistent with the federal statute. *E.g.*, *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949). Finally, in *Garmon* the Court determined that it must look at the conduct being regulated and set down a rule of predictable judicial application. 427 U.S. at 139.

43. 436 U.S. at 183.

44. *Id.* at 188-89. Justice Brennan argued that the majority was creating a potentially broad and dangerous exception which would cast aside the *Garmon* rule which had weathered 20 years of experience. *Id.* at 215-17 (Brennan, J., dissenting).

In reality, the *Garmon* principle had never been applied "woodenly" because the Court

the “arguably prohibited conduct” and stated that the sole reason for this wing of *Garmon* was to protect the NLRB’s primary jurisdiction.⁴⁵ State regulation would not be preempted, therefore, unless the controversy presented to the state was “identical” to that which could have been brought before the NLRB. The Court reasoned that “it is only [then] that a state court’s exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board.”⁴⁶ Thus, after *Sears*, the key question regarding the prohibited wing of *Garmon* was whether the state and the Board would be focusing on the same aspects of the challenged conduct.⁴⁷

The *Sears* court then considered the “arguably protected conduct” exception and stated dual reasons for this wing: the NLRB primary jurisdiction and the supremacy concern of safeguarding federally protected conduct.⁴⁸ When a plaintiff in a state proceeding has no method for invoking the Board’s jurisdiction, and the defendant fails to do so, there is “no risk of overlapping jurisdiction.”⁴⁹ There is, however, still a danger that the state court could prohibit conduct protected by federal law. In this situation, in which there is significant risk that a misinterpretation of federal law could result in the prohibition of protected conduct, a state can therefore still be preempted from acting, despite the unavailability of the NLRB as a forum. In such a case, the state court must weigh the risk of an erroneous state court adjudication against the consequence of the absence of any forum in which to litigate the state claim or the protected conduct issue.⁵⁰

Sears, in effect, created exceptions to the *Garner-Garmon* line of preemption. While the primary inquiry in each case remained whether the conduct sought to be regulated by the states was actually or arguably protected by section 7 or prohibited by section 8 of the LMRA, the method of analysis was significantly altered. *Sears*, however, did not change the rationale underlying the *Garner-Garmon* line of preemption: that is, the pri-

had created numerous exceptions to the doctrine. See notes 67-83 and accompanying text *infra*.

45. 436 U.S. at 197.

46. *Id.*

47. In *Sears*, the state court, in a trespass action, would be adjudicating the locus of the picketing, while the Board would be concerned primarily with the Union’s objective for the picketing. *Id.* at 198.

48. *Id.* at 199-200.

49. *Id.* at 201.

50. *Id.* at 206-07. The Court reasoned that in some circumstances the state may not act despite the lack of a federal forum since Congress may have preferred the “costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction.” *Id.* at 203.

mary jurisdiction and the federal supremacy issues. In contrast, the second line of labor preemption is analytically distinct from the *Garner-Garmon* line, permitting preemption of conduct that is neither protected nor prohibited by the LMRA.

B. Lodge 76: Avoiding Conflicts With the National Labor Policy

The Supreme Court implicitly suggested the existence of a second line of preemption in *Local 20, Teamsters v. Morton*.⁵¹ In this case, a striking union persuaded a customer of the primary employer to terminate business dealings with that employer. The employer brought suit against the union in the United States District Court for the Northern District of Ohio, alleging violations of both the LMRA and Ohio common law.⁵² The court found a violation of both and assessed actual and punitive damages. The Court of Appeals affirmed.⁵³ The Supreme Court found that the union's conduct was not a secondary boycott of the kind prohibited by section 303 of the LMRA, since the union had not used coercion against the customer's employees in garnering the customer's support.⁵⁴ The Court nonetheless held that Ohio law was preempted, reasoning that Congress, by enacting section 303, had occupied the field and thus implicitly intended to leave all unaddressed matters in this area free from state regulation.⁵⁵ Congress, in the Court's view, struck a balance between the competing interests of labor and management when it "select[ed] which forms of economic pressures should be prohibited by section 303."⁵⁶ The Court considered it crucial that areas neither explicitly protected nor prohibited by section 303 should remain unregulated and available to the parties to the extent that this would effectuate national labor policy.⁵⁷

This second line of preemption came to fruition in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*,⁵⁸ where the Court explicitly identified the existence of the two

51. 377 U.S. 252 (1964).

52. *Id.* at 253-54. The employer sought damages due to business losses, claiming that the customer interference was unprotected conduct under the Act and a tortious conspiracy under Ohio common law. *Morton v. Local 20, Teamsters*, 200 F. Supp. 653, 656 (N.D. Ohio 1961).

53. *Morton v. Local 20, Teamsters*, 320 F.2d 505, 509 (6th Cir. 1963).

54. 377 U.S. at 259.

55. *Id.* at 258.

56. *Id.* at 258-59 (quoting *United Bhd. of Carpenters & Joiners v. NLRB*, 257 U.S. 93, 98 (1958)).

57. *Id.* at 259-60.

58. 427 U.S. 132 (1976). While the *Lodge 76* decision definitively identified this second line of preemption, it observed that the *Garner* Court recognized the unacceptability of a state "imping[ing] on the area of labor combat designed to be free." *Id.* at 144 (quoting

lines.⁵⁹ Here, the union members, protesting a contract dispute, refused to work overtime. The employer filed unfair labor practice charges against the union with both the NLRB and the Wisconsin Employment Relations Commission (WERC). The Regional Director for the NLRB dismissed the charge, ruling that the conduct was not regulated under the LMRA.⁶⁰ The WERC, however, held that the concerted activity was an unfair labor practice under Wisconsin law. The Wisconsin Supreme Court affirmed.⁶¹ Since the conduct was neither protected nor prohibited under federal law, any attempt to displace state law could not rest on the *Garner-Garmon* line of preemption. The Supreme Court held that the state law was preempted since enforcement of the state statute would allow the state to determine the validity of an economic weapon used by the union in the normal course of collective bargaining. Such a result, the Court determined, would be contrary to congressional intent as manifested in the federal labor laws.⁶²

Premised on a finding that the conduct is neither clearly nor arguably protected by section 7 nor prohibited by section 8 of the LMRA, the second line of inquiry, therefore, is whether the conduct should nonetheless be unregulated because Congress left it "to be controlled by the free play of economic forces."⁶³ This theory is based on the supposition that Con-

Garner, Central Storage Co. v. Teamsters, 346 U.S. at 500). It also made clear that the decision in *Local 20, Teamsters v. Morton*, 377 U.S. 252 (1964), while not explicitly enunciating the rationale, was based on the second line of preemption. 427 U.S. at 146.

59. 427 U.S. at 138.

60. *Id.* at 134-35.

61. *Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 67 Wis. 2d 13, 226 N.W.2d 203 (1975).

62. 427 U.S. at 148-50. The majority expressly overruled *International Union, U.A.W. v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949) (*Briggs-Stratton*) decided 17 years earlier. 427 U.S. at 141, 151, 154-55. The Court in *Briggs-Stratton* had held that since the union disrupted work by calling meetings during work time, the meetings were not protected or prohibited under the Act, and the state could assert jurisdiction.

For a critical analysis of the *Lodge 76* preemption theory, see Note, *State Regulation of Peaceful Self-Help Conduct is Preempted by National Labor Policy—Lodge 76, Int'l. Ass'n. of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 26 DEPAUL L. REV. 696 (1977). The author contends that *Morton* creates a "no-man's land" where neither federal courts nor states can act. Even conduct having a minimal effect on commerce is precluded from state regulation despite the lack of clear congressional intent that the conduct should remain entirely unregulated in all cases. *Id.* at 706 n.52.

63. 427 U.S. at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)). One commentator suggests there should be only one type of preemption, the *Morton-Lodge 76* type, which assesses more fairly whether conduct was meant to be left exclusively to the federal government. See Cox, *supra* note 1, at 1359. It should be noted that although Professor Cox's article was written prior to *Lodge 76*, he correctly assessed the impact and direction of *Morton*, by advocating a *Lodge 76* analysis. The Court, in fact, cited Professor Cox's article in its description of the second-line preemption in *Lodge 76*. 427 U.S. at 140 n.4.

gress intended certain conduct to be left available to the parties in order to maintain the delicate balance between them in collective bargaining under the federal scheme.⁶⁴ This line is, therefore, analytically distinct from the first line of preemption.⁶⁵ The Court summarized this type of preemption as a question of whether the states' attempts to restrict or prohibit "self help would frustrate effective implementation of the policies of the National Labor Relations Act."⁶⁶

C. *Exceptions to the Preemption Doctrine*

The Supreme Court has identified exceptions to the first line of preemption.⁶⁷ Under certain conditions, a state may, through its courts or its legislature, restrict or regulate certain conduct even though this intervention may encroach upon federal labor policy. The circumstances under which states may so regulate conduct may be grouped into three categories. The first category of exceptions consists of those instances in which Congress explicitly or implicitly authorized states to act.⁶⁸ The second exception is

64. *Id.* at 150. The Court's task is often one of "deciphering an unexpressed intent of Congress." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. at 187. This is made all the more difficult because, although the LMRA leaves much to the states, Congress has not specified the parameters of their authority. *See Garner, Central Storage Co. v. Teamsters Local 776*, 346 U.S. at 488. *See also Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. at 289.

Some members of the Court had rejected this implied congressional intent theory. Justice Stevens commented in *Lodge 76* that Congress never considered the conduct in question, and its lack of expression does not imply that Congress intended to leave the conduct unregulated. 427 U.S. at 167 (Stevens, J., dissenting). However, the majority view has prevailed. Justice Stevens, writing for the plurality in *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979), joined by Justice Rehnquist who had joined Justice Stevens in his *Lodge 76* dissent, accepted the theory that Congress may have intended to leave unfettered conduct which is neither protected nor prohibited under the Act. *Id.* at 530.

65. *See Cox, supra* note 1, at 1346. Professor Cox termed this category of preemption "permitted activities." These are acts which are neither protected nor prohibited by the labor laws but which are permitted because the states may not interfere.

66. *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. at 531; *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969) (interpreting the Railway Labor Act).

67. *Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-98 (1971).

68. *Farmer v. San Diego County Dist. Council of Carpenters*, 430 U.S. 290, 297 (1977). For example, state courts have explicit authority to enforce collective bargaining agreements under § 301 of the LMRA, 29 U.S.C. § 185 (1976). *See Smith v. Evening News*, 371 U.S. 195 (1962); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Under § 303, 29 U.S.C. § 187 (1976), individuals may recover damages in state court for injuries sustained due to secondary boycott activity prohibited in § 8(b)(4) even where the unfair labor practice can be remedied by Board action.

An example of implicit state court authority is illustrated by *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. at 540-44. In that case it was determined that congress-

in the instance of state interest in traditionally local concerns.⁶⁹ Specifically, state assertions of jurisdiction have been supported when the state has had an overriding traditional interest in protecting its citizens against such conduct as mass picketing,⁷⁰ threats of violence,⁷¹ malicious libel,⁷² and intentional infliction of emotional distress.⁷³ The third category of exceptions consists of those circumstances in which state regulation would have only a minimal effect on the collective bargaining relationship or be only a peripheral concern to the federal labor laws.⁷⁴ An alleged wrongful expulsion of a union member from union membership,⁷⁵ and a charge that a union statement against an agent of the employer was knowingly false and thus libelous⁷⁶ are examples of issues which have been so labeled. In another judically created area the Court has waived preemption where a particular rule of law is so structured and administered that state review would not jeopardize federally protected interests.⁷⁷

Finally, some members of the Supreme Court have indicated that a state may enforce neutral laws of general applicability because of their indirect

sional intent to permit states to pay strikers unemployment benefits was based on the legislative history of the NLRA and the Social Security Act of 1935, 42 U.S.C. §§ 301, 501-504 (1976).

69. This exemption is stated in *Garmon* as "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction we could not infer that Congress had deprived the states to act." 359 U.S. at 244. *Accord*, *Farmer v. Carpenters Local 25*, 430 U.S. 290, 296 (1977); *Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 290 (1971); *Local 20, Teamsters v. Morton*, 377 U.S. 252, 257 (1964); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

70. *E.g.*, *United Automobile, Aircraft & Agricultural Implement Workers v. Russell*, 356 U.S. 634 (1958).

71. *E.g.*, *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1953).

72. *E.g.*, *Linn v. United Plant Guard Workers Local 144*, 383 U.S. 53 (1966).

73. *E.g.*, *Farmer v. Carpenters Local 25*, 430 U.S. 290 (1977).

74. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

75. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). *But see* *Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), which made clear that the implication in *Gonzales* that any union member conflict is an appropriate area for state action, cannot survive the *Garmon* preemption analysis. Thus *Gonzales* must be read as permitting state action because the conduct in question was only of peripheral concern to the NLRA, focusing exclusively on the union constitution and by-laws. *Id.* at 295-97.

76. *Linn v. United Plant Guard Workers Local 144*, 383 U.S. 53 (1966).

77. *See* *Farmer v. Carpenters Local 25*, 430 U.S. at 298. *See also* *Vaca v. Sipes*, 386 U.S. 171 (1967) on the issue of the duty of fair representation owed by the union to its members. The Court in *Vaca* stated that the reasons for this exception were threefold: the courts had developed the law of fair representation, the NLRB had no greater expertise in these cases, and preemption might eliminate judicial review. *See* F. BARTOSIC & R. HARTLEY, *LABOR RELATIONS LAW IN THE PRIVATE SECTOR* 28 (1977).

effect on labor policy.⁷⁸ The precedent, however, consistently and unambiguously suggests that such distinctions should not be made. Justice Frankfurter, writing for the majority in *Garmon*, noted that it was of no consequence whether a state acted under a law of general applicability or one narrowly directed toward labor-management relations.⁷⁹ This confusion may explain the dicta in *Sears, Roebuck & Co. v. Carpenters*.⁸⁰ In *Sears*, the majority reasoned that preemption concerns, which seek to avoid a multiplicity of tribunals and to promote uniform application of the laws, are most relevant when applied to state laws regulating the collective bargaining process.⁸¹ *Sears* made clear, however, that laws of general applicability when invoked in a labor dispute will be preempted if the state laws regulate conduct also regulated by the federal Act.⁸² The Court is presently split on whether laws of general applicability deserve different treatment.⁸³

While these exceptions clearly apply to the first line of preemption, the Court has never held that they similarly apply to the second line. A majority of the Court in *New York Telephone Co. v. New York State Department of Labor*,⁸⁴ however, implicitly extended the exception of "interests so deeply rooted in local feeling and responsibility" to the second line of preemption by integrating this exception into its *Lodge 76* analysis.⁸⁵ This

78. Thus, in his concurring opinion in *Lodge 76*, Justice Powell argues that states should be free to enforce such neutral laws dealing with torts, contracts, and other important public policy concerns which have an incidental effect on federal labor policy, unless Congress has specified to the contrary. 427 U.S. at 156 (Powell, J., concurring). Actually, Powell's elucidation could be interpreted as being synonymous with the "peripheral concerns" and "deeply rooted local interests" exceptions. See notes 69-76 and accompanying text *supra*.

In *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, the plurality approached the problem by placing a lighter burden on laws of general applicability and surmised that a congressional desire to preempt state enforcement of general laws is more difficult to infer than the intent to preempt enforcement of laws directed specifically at union-management activities. *Id.* at 533.

79. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 244. See also *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. at 197; *Farmer v. Carpenters Local 25*, 430 U.S. at 300. But see *Local 100, United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690 (1963), where preemption was found, despite the assertion of a general common law tort, breach of contract.

80. 436 U.S. 180 (1978).

81. *Id.* at 192 (quoting *Garner*, *Central Storage Co. v. Teamsters*, 346 U.S. at 498-99).

82. *Id.* at 193.

83. There were four separate opinions in *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979). The plurality opinion and Justice Brennan's concurrence suggest a distinction should be made. Justice Blackmun's concurrence and Justice Powell's dissent reject any such distinction.

84. 440 U.S. 519 (1979).

85. See *id.* at 539-40 (dicta); *id.* at 550 (Blackmun, J., concurring); *id.* at 560 (Powell, J.,

approach seems logical because it would be incongruous to allow, for example, states to prohibit threats of violence during employee picketing, a first line preemption case,⁸⁶ but to then deny the states the same right when the threats arise during a concerted refusal to work overtime, a second line case.⁸⁷ Finally, since the *Lodge 76* line of preemption is premised on an implied congressional intent to leave conduct unregulated, specific congressional authorization to allow state action would logically be another exception to the second line of preemption.

From the foregoing review of federal preemption case law, a framework can be developed within which to analyze all preemption issues in the field of labor relations. The first step is to determine, under the *Garner-Garmon-Sears* line, whether the activity the state seeks to regulate is clearly or arguably protected or prohibited by the LMRA. If the activity is not protected or prohibited, the next step is to determine if the state regulation, under the *Lodge 76* line, would frustrate national labor policy. If it would not, then the state action is not preempted.

When the activity is actually or arguably prohibited by section 7, states are not preempted unless the controversy presented to the state court is "identical" to that which could have been presented to the Board. If the conduct is actually protected by section 7, states are preempted. If the conduct is only arguably protected, states are also preempted unless the aggrieved party has no method of presenting his claim to the NLRB, the opposing party fails to raise the issue with the Board, and the consequences of denying the aggrieved party a forum outweigh the risk of state court misinterpretation of federal law. If the state regulation is not protected or prohibited but would frustrate the effective administration of federal labor policy, it will be preempted.

Finally, regardless of the foregoing, preemption will not occur: (1) when there is congressional intent to permit the state to act; (2) when there are "interest[s] so deeply rooted in local feeling and responsibility";⁸⁸ or (3) when the conduct regulated is only of peripheral concern to the federal labor laws. All of these exceptions apply to the *Garner-Garmon* line and arguably, the first two apply to the *Lodge 76* line as well.

dissenting). One could also infer from the tone of the *Lodge 76* decision that the Court, at that time, had no doubts about extending the exceptions. 427 U.S. 132 (1976).

86. See note 71 and accompanying text *supra*.

87. See text accompanying notes 58-60 *supra*.

88. See note 69 *supra*.

II. PREEMPTION THEORY AS APPLIED TO STATE STRIKEBREAKING LAWS

A. *State Strikebreaking Laws*

Strikebreaking laws, as referred to in this Note, are those statutes that, in varying forms and degrees, regulate the hiring, transporting, recruiting, or supplying of workers to replace employees engaged in a strike or subjected to a lockout. Thirty states have such laws,⁸⁹ some of which were enacted prior to the passage of the National Labor Relations Act.⁹⁰ Although the preemption doctrine as it relates to the federal labor laws had not yet been developed, many of these early statutes were unsuccessfully challenged under constitutional theories of due process and equal protection.⁹¹ Recent challenges have resurrected these constitutional theories in conjunction with the preemption argument.⁹²

89. CAL. LAB. CODE §§ 973-974 (West 1971), §§ 1132-1136 (West Supp. 1980); COLO. REV. STAT. § 8-2-104 (1973); CONN. GEN. STAT. ANN. § 31-121 (West 1958); DEL. CODE ANN. tit. 19, § 703 (1979); HAWAII REV. STAT. § 379 (1976); ILL. REV. STAT. ch. 48, § 2c (1941), § 2f-h (Supp. 1980-81); IND. CODE ANN. § 25-16-1-12 (Burns 1974); IOWA CODE ANN. §-732.6 (West 1979); KY. REV. STAT. § 340.050(2) (1977); LA. REV. STAT. ANN. §§ 23:901-904 (West 1964); ME. REV. STAT. tit. 26, §§ 851-856, 921 (1974); MD. ANN. CODE art. 100, § 51A (1957); MASS. GEN. LAWS ANN. ch. 149, §§ 22-24, ch. 150 § 1-4 (West 1975); MICH. COMP. LAWS ANN. §§ 423.251-254, 423, 251 (1978); MINN. STAT. ANN. §§ 181.64-.65 (West 1966), § 184.38(10) (West Supp. 1980); MONT. REV. CODE ANN. §§ 41-2501 to -2505 (Supp. 1975); NEV. REV. STAT. § 613.010 (1973); N.H. REV. STAT. ANN. §§ 275:11-14, 275-A:1 to -A:5 (1977 & Supp. 1979); N.J. STAT. ANN. §§ 34:13 C-1, -2, -3, -5 (West 1965); N.D. CENT. CODE § 34-13-15(10) (1980); OHIO REV. CODE ANN. § 4143.12(D) (Page 1973); OKLA. STAT. ANN. tit. 40, §§ 167-168 (West 1951), tit. 40, § 55k (West Supp. 1979-80); OR. REV. STAT. §§ 629.210, 662.205, 662.215, 662.225 (1979); PA. STAT. ANN. tit. 43, § 557 (Purdon 1964), tit. 43, §§ 217.21-26 (Purdon Supp. 1980-81); R.I. GEN. LAWS §§ 28-10-9 to 28-10-14 (1979); S.D. COMP. LAWS ANN. §§ 60-6-19 to 60-6-21 (1978); TENN. CODE ANN. §§ 50-204 to -205 (1977); VT. STAT. ANN. tit. 21, § 1621(a)(8); WASH. REV. CODE ANN. §§ 49.44.100, 49.44.110 (1962); WIS. STAT. ANN. § 103.43 (West 1974).

90. *E.g.*, MASS. GEN. LAWS ANN. ch. 149, § 22 (West 1979) (originally passed, 1914 Mass. Acts ch. 237, §§ 1, 6); R.I. GEN. LAWS §§ 28-10-9 to 28-10-14 (originally passed, 1910 R.I. Pub. Laws § 3765); OKLA. STAT. ANN. tit. 40, § 167 (West 1951) (originally passed, 1907-08 Okla. Sess. Laws, at 514, 1909 Okla. Comp. Laws § 4043).

91. *See* *Commonwealth v. Libbey*, 216 Mass. 356, 103 N.E. 923 (1914) (upheld constitutionality of a notice statute); *Riter-Conley Mfg. Co. v. Wryn*, 70 Okla. 247, 174 P. 280 (1918) (upheld constitutionality of a notice statute); *Biersach & Neidermeyer Co. v. State*, 177 Wis. 388, 188 N.W. 650 (1922) (upheld constitutionality of a statute requiring notice to prospective workers of the existence of a labor dispute). *But see* *Josma v. Western Steel Car & Foundry Co.*, 249 Ill. 508, 94 N.E. 945 (1911) (held a notice statute void under the state constitution); *Matthews v. People*, 202 Ill. 389, 67 N.E. 28 (1903) (statute held void for proscribing referral of replacement workers by employment offices).

92. *See* *Alton Box Board Co. v. City of Alton*, 77 L.R.R.M. 2123 (S.D. Ill. Jan. 26, 1971) (held that a city ordinance which prohibited hiring, recruiting, and referral of strikebreakers, was unconstitutional under the fifth and fourteenth amendments as a denial of due process, equal protection, and the right to contract); *Chamber of Commerce v. New Jersey*,

The preemption doctrine remains the critical challenge to these statutes.⁹³ For purposes of this analysis, strikebreaking laws will be grouped into three categories: (1) laws proscribing the hiring, recruitment, or transport of replacement workers⁹⁴ by employers engaged in labor disputes;⁹⁵ (2) laws proscribing the recruitment, transport, or referral of replacement workers by third parties not involved in a labor dispute (often restricted to the procurement of out-of-state workers);⁹⁶ and (3) laws requiring employers or third parties to give notice of a labor dispute when advertising for, recruiting, or hiring replacements.⁹⁷ Although all of these laws affect the hiring of replacements, their ability to withstand preemption scrutiny differs. The effects these laws are perceived to have upon federal labor relations policy are the key to whether such state regulation will be preempted.

B. *An Employer's Right to Hire Replacements*

Under common law, courts traditionally recognized the right of an employee to withhold his labor from his employer.⁹⁸ When confronted with

No. L-21147-79 (N.J. Super. Ct. June 13, 1980) (court rejected a challenge of unconstitutionality vagueness but held that the statute which proscribed hiring and recruitment of replacements was void as a denial of due process and equal protection).

For a discussion of these statutes' validity under due process and the commerce clause, see Comment, *Anti-Strikebreaking Legislation—The Effect and Validity of State-Imposed Criminal Sanctions*, 115 U. PA. L. REV. 190 (1966).

93. In response to constitutional challenges directed at vagueness, privileges and immunities, freedom of speech, equal protection, due process, the commerce clause, freedom of association, and the supremacy clause, the court in *Chamber of Commerce* responded "the principal hurdle the statute must pass to stand constitutional muster is the issue of Federal preemption." *Chamber of Commerce v. New Jersey*, No. L-21147-79, slip op. at 46 (N.J. Super. Ct. June 13, 1980).

For cases which have considered the effects of preemption on strikebreaking legislation, see *Illinois v. Federal Tool & Plastics*, 62 Ill. 2d 549, 344 N.E.2d 1 (1975); *Warren v. State Dep't of Labor*, 313 So. 2d 6 (La. Ct. App. 1975); *Bahr v. New York Tel. Co.*, 69 Misc. 2d 138, 329 N.Y.S.2d 501 (1972); *Alton Box Board Co. v. City of Alton*, 77 L.R.R.M. 2123 (S.D. Ill. Jan. 26, 1971); *Milwaukee Cheese Co.*, 48 L.R.R.M. 1435 (Aug. 4, 1961).

94. While many statutes prohibit the hiring of any replacement workers, some statutes specifically prohibit only professional strikebreakers. See, e.g., CAL. LAB. CODE §§ 1132-1136 (West Supp. 1980) (a professional strikebreaker is defined as a person (other than supervisory personnel) who accepts employment where a labor dispute is in progress, on repeated occasions, within a five year period for the purpose of replacing striking employees).

95. E.g., N.J. STAT. ANN. § 34:13C-1(c) (West 1965).

96. E.g., DEL. CODE ANN. tit. 19 § 704 (1970).

97. E.g., HAWAII REV. STAT. § 379-3 (1976).

98. *Barker Painting Co. v. Brotherhood of Painters*, 15 F.2d 16 (3rd Cir. 1926); *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842). It should be noted that in the early nineteenth century the right to strike was prohibited under the criminal conspiracy doctrine. See *Commonwealth v. Pullis* (The Philadelphia Cordwainers' Case) (Mayor's Ct., Phila. Pa. 1806) reprinted in J. COMMONS & E. GILMORE, 3 DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, 59-248 (2d ed. 1910).

the concerted pressures of a strike, however, employers often have reacted offensively by hiring strikebreakers to replace striking employees, guards to protect the strikebreakers and the property, spies to circulate among the picket lines, and armed men to break a strike through force and violence.⁹⁹ The very hiring of strikebreakers itself was often the cause of violence especially when replacements were professional strikebreakers with little or no technical job skills who simply wished to prolong the strike for their own financial benefit.¹⁰⁰ By hiring replacements the employer hoped to break the strike and continue the normal operations of the business.

The right of employees to organize has been upheld as a fundamental right.¹⁰¹ To advance that right and to ensure employees an effective voice in determining the terms and conditions of their employment, the NLRA was enacted,¹⁰² guaranteeing employees the right to engage in concerted activities, including the right to strike.¹⁰³ If the NLRA raised any doubts as to workers' employment status during a strike, or as to the employer's right to terminate a striking employee, those doubts were soon extinguished in the landmark decision of *NLRB v. Mackay Radio & Telegraph Co.*¹⁰⁴ The union struck Mackay when the latter failed to execute an agreement concerning terms and conditions of employment. Mackay replaced the striking employees with employees from its other offices in order to maintain services. When the strike ended, Mackay rehired all but five of the striking employees, asserting that the five had been permanently replaced.¹⁰⁵ The Supreme Court held that the employer had committed an unfair labor practice in violation of section 8(a) of the NLRA¹⁰⁶ by discriminatorily refusing to rehire the five employees who had been active in union affairs.

99. See generally I. BERNSTEIN, *THE LEAN YEARS* (1960).

100. See generally P. TAFT, *ECONOMICS AND PROBLEMS OF LABOR* 497, 500 (3d ed. 1955); A. TAYLOR, *LABOR PROBLEMS AND LABOR LAW* 450-52 (2d ed. 1939); L. MACDONALD, *LABOR PROBLEMS ON THE AMERICAN SCENE* 611-13 (1938).

101. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 5, 33 (1937).

102. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-166 (1976)).

103. 29 U.S.C. § 157 (1976). This section has been interpreted as protecting the right to strike. See *Street, Elec. Ry. & Motor Coach Employees v. Missouri*, 374 U.S. 74, 82 (1963). This right is qualified. Whether a strike is protected depends on the objective sought and the means used to obtain it. The objectives and the means may not be unlawful nor may they contravene the basic policies of the LMRA. See *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950).

104. 304 U.S. 333 (1938).

105. *Id.* at 339.

106. 29 U.S.C. § 158(a)(3) (1976). This section provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

The Court's comments in *Mackay* concerning the employer's right to replace strikers were highly significant, as discussed below.

The Court first distinguished a strike over economic terms and conditions of employment (an economic strike) from a strike precipitated by an unfair labor practice (a ULP strike). It then stated that an employer could not permanently replace ULP strikers but could replace economic strikers so long as such replacements were not discriminatory against employees engaged in union activities.¹⁰⁷ The employer is "guilty of no act denounced by the statute," in permanently replacing economic strikers, the *Mackay* Court reasoned, since the employer has the right to protect its business.¹⁰⁸ Although this pronouncement has been criticized as dictum,¹⁰⁹ it has been followed consistently to this day.¹¹⁰

Mackay established that section 8(a) of the NLRA does not prohibit an employer from permanently replacing economic strikers. Neither does section 7 protect this employer activity.¹¹¹ Since the replacement of economic strikers, which is what strikebreaking laws seek to regulate, is neither clearly or arguably protected nor prohibited by the Act, regulation of this conduct through strikebreaking laws would not be subject to a *Garner-Garmon* preemption analysis.¹¹² Such regulation, however, would be subject

107. 304 U.S. at 345.

108. *Id.* at 345-46.

109. See Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1203-04 (1967); Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 631 (1966).

110. See *NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967); *Meat Cutters & Butchers Local 576 v. Wetterau Food, Inc.*, 597 F.2d 133, 138 (8th Cir. 1979); *NLRB v. Wells Fargo Armored Serv. Corp.*, 597 F.2d 7, 10 (1st Cir. 1979).

111. Section 7 of the LMRA protects only employee conduct without corresponding protection for employer activities. *Mackay Radio* held that the employer "has [not] lost the right to protect and continue his business by supplying places left vacant by strikers." 304 U.S. at 345. Although a cursory reading of the language may lead one to conclude that employers have a statutorily protected right to hire replacements, the decision is based on the silence of the LMRA and merely states that the Board has no right to prohibit such conduct.

112. See text accompanying notes 30-42 *supra*. One commentator suggests that such laws are arguably subject to the jurisdiction of the LMRA because the NLRB has found the employer guilty of an unfair labor practice when it has replaced strikers under certain conditions, such as giving "superseniority" over strikers. See Comment, *supra* note 92, at 211. However, the unfair labor practice is not the act of replacing striking employees; rather, it is the employer's discrimination against such employees because of their union activity, with the objective of discouraging union membership or other protected union conduct. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-35 (1963). Therefore, the act of replacing striking employees is the "aspect" of the employer's conduct regulated by these state strikebreaking statutes while the discrimination against strikers is the "aspect" of the employer's conduct regulated in cases involving the granting of superseniority to replacements. Thus, the con-

to *Morton-Lodge 76* preemption analysis.¹¹³ Preemption examination of strikebreaking statutes, then, must determine whether restriction of the employer's ability to replace striking employees would frustrate the purpose of the national labor policy or the implementation of the labor laws.¹¹⁴ Although *Morton, Lodge 76*, and the majority of the other preemption cases concern impediments to union activities, the Supreme Court has left no doubt that the preemption doctrine applies equally to regulations affecting employers. The *Lodge 76* opinion noted that the crucial question regarding preemption remains the same whether the conduct is that of the union or the employer.¹¹⁵

C. Frustrating National Labor Policy

Whether strikebreaking laws obstruct federal labor policy is a factual determination.¹¹⁶ As discussed above, strikebreaking laws generally prohibit or restrict employer hiring of replacement workers. Hiring replacements is an economic self-help measure which an employer can use to combat a strike. A strike will usually be more successful, and hence a union will usually be more successful in winning concessions, when the union's economic strength outweighs that of the employer. The effectiveness of an employer's defense will depend, in part, on the availability of other labor and on the employer's ability to recruit workers.¹¹⁷ The Supreme Court has consistently stressed the importance of freedom to engage in self-help and the disruptive effect curtailment of that freedom would have on the collective bargaining process.¹¹⁸ Consequently, any attempt to restrict the economic weapons an employer may utilize to combat

troveries are not "identical" and the arguably prohibited wing of *Garner-Garmon* does not compel preemption. See text accompanying notes 45-47 *supra*.

113. See text accompanying notes 51-66 *supra*.

114. See *Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. at 147-48.

115. *Id.* at 147.

116. In *ITT Lamp Div. v. Minter*, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971), the First Circuit stated that the question of whether providing welfare assistance to strikers would tip the balance between labor and management requires a finding of fact which balances those state and federal interests. The impact on collective bargaining and on strikers of a grant or denial of welfare must be calculated and evaluated. *Id.* at 993. But the court suggested that the mass of information needed indicates that Congress is the proper forum to resolve the issue. *Id.* at 993-94.

117. Smith & DeLancey, *The State Legislatures and Unionism*, 38 MICH. L. REV. 987, 991 (1940).

118. *Local 20, Teamsters v. Morton*, 377 U.S. at 259-60; *Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. at 146; *NLRB v. Insurance Agents*, 361 U.S. at 489; *Local 1776, Carpenters & Joiners Union v. NLRB*, 357 U.S. 93, 100 (1958). Cf. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108-109 (1970) (right of parties to use self-help even

the economic pressures of a strike will have significant influence on the terms and conditions of employment negotiated by the parties.¹¹⁹ The Supreme Court has warned that the determination of the permissible range of self-help must be left to Congress and not to diverse state laws since piecemeal, partisan interference could upset the delicate balance between labor and management.¹²⁰ The right of employers to secure their demands at the bargaining table through resort to economic self-help has been unequivocally defended.¹²¹

Consequently, the prohibitive effect that the first category of strike-breaking laws—those regulating the conduct of the struck company—has on the employer's ability to hire replacements suggests that such legislation upsets the balance struck by the federal labor laws. The employer's success in hiring replacements could affect the outcome of the dispute or discourage employees from pursuing a strike for fear of losing their jobs. *Mackay* established that the use of replacements was a legitimate economic weapon to be used by the employer to protect his or her business.¹²² The court in *Chamber of Commerce*, presented with an attack on the New Jersey strikebreaking statute, found that a critical element in the balance of power in collective bargaining is the employer's prime economic weapon of replacing strikers.¹²³ Clearly, restraint on the employer's ability to hire replacements interferes with an economic self-help measure and consequently upsets the balance between labor and management in collec-

though NLRB and courts might find that resort to self-help in some instances, might actually disrupt industrial peace and lead to a one-sided agreement).

The term "self-help" refers to actions taken by the parties in a labor dispute which (1) advance that party's economic interests, (2) are within a party's own power, and (3) are maintained by a party's economic resources, thus excluding any recourse to the courts or the NLRB. Perhaps the ultimate self-help weapons are the union's strike and the employer's lockout. See generally *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957).

119. See *Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. at 144; *NLRB v. Insurance Agents*, 361 U.S. at 490.

120. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969) (quoting *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 691 (1963)).

121. The Court has upheld the use of an offensive lockout after an impasse in negotiations but prior to a strike, *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), and the use of a lockout and temporary replacements by a nonstruck member of a multiemployer bargaining group in support of a struck member of the multiemployer group, *NLRB v. Brown*, 380 U.S. 278 (1965).

122. 304 U.S. 333, 345 (1938).

123. See *Chamber of Commerce v. New Jersey*, No. L-21147-79, slip op. at 48 (N.J. Super. Ct. June 13, 1980). See also *Illinois v. Federal Tool & Plastics*, 62 Ill. 2d 549, 554, 344 N.E.2d 1, 4 (1975) (the right to hire replacements is an important economic weapon left to the employer by Congress).

tive bargaining: this "frustrates the effective implementation" of federal labor policy.¹²⁴

A somewhat different question is raised with the second category of strikebreaking laws, that is, those laws which regulate third parties. Although this class of legislation is not directed at the parties to the dispute, it nevertheless adversely affects an employer's ability to secure replacements by interdicting an employer's ability to obtain willing workers through employment agencies or through other employers within the same industry.

The third category of laws, notice statutes, does not prohibit the hiring of replacements, but does restrict the employer's ability to solicit those replacements. The notice requirements presumably discourage some otherwise potential replacement employees from interfering in a labor dispute. By thus inhibiting an employer's ability to maintain business operations, these statutes tip the balance in the collective bargaining process in favor of the union. This, in turn, frustrates effective implementation of federal labor policy.¹²⁵

An apparent dichotomy emerges in that notice statutes provide potential striker replacements with information so that they might make an informed decision about whether to intervene where a labor dispute is in progress. Such information would appear to be completely consonant with the national labor policies of promoting employee freedom to self-organize, to bargain collectively, and to engage or refrain from engaging in concerted activities.¹²⁶ That this dichotomy is merely apparent, however, is based on two factors. First, there is no support in a *Lodge 76* preemption for balancing the "good" effects with the "bad" effects of state regulation. The fact that a notice statute may promote the effective administration of

124. Not all state regulation of replacements would necessarily frustrate federal labor policy under this line of preemption. For example, a state might decide to proscribe discrimination against strikers in favor of replacements, *see* note 112 *supra*, or a state might restrain the hiring of replacements who forcefully disrupt a strike. These regulations, however, may raise a *Garner-Garmon* preemption claim since they appear to regulate conduct protected and prohibited under the Act.

If an employer sought to replace his strikers with professional strike breakers, *see* note 94 *supra*, the analysis would not change. The employer's self-help weapon is the right to hire replacements. Whether a state prohibits the hiring of replacements or qualifies the type of replacement who can be hired, the interference becomes one of degree. Thus both regulations would be equally impermissible.

125. *See* *Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. at 148-51. The court in *Federal Tool & Plastics* considered the validity of a notice statute and determined that it frustrated the national labor policy. 62 Ill. 2d at 554, 344 N.E.2d at 4.

126. *See* 29 U.S.C. §§ 151, 157 (1976) and note 32 *supra*. A potential replacement's interest in choosing whether or not to work where a labor dispute is in progress is not one just of convenience, but can actually be a protected right. "[T]he right to engage in a sympathy strike or honor another union's picket line is also protected" under § 7 of the LMRA. *Gary-Hobart Water Corp.*, 210 N.L.R.B. 742, 744 (1974), *enforced*, 511 F.2d 284 (7th Cir. 1975).

national labor policy in the area of employee free choice cannot mitigate its frustrating effect upon the balance of economic strength in the bargaining process.¹²⁷ Second, while *Lodge 76* defined the frustration of the effective administration of labor policy solely in terms of regulation of economic weapons which upset the labor-management balance, this need not be the sole method of frustrating labor policy. Any attempt by the state to regulate an area occupied by the federal labor laws, either by curtailing rights or bestowing greater rights, could arguably frustrate the effective administration of federal labor policy, and thus fall within the prohibitions of the second line of preemption. By analogy to the *Lodge 76* line of cases, it could be argued that by enacting section 7, Congress occupied the field, thereby precluding regulation;¹²⁸ thus state notice statutes could be preempted as attempts to extend or make more efficacious the federally occupied area of section 7 rights.

Although strikebreaking statutes may interfere with the self-help weapons of an employer and thus have a frustrating effect on federal labor policy, it cannot necessarily be concluded that these laws are preempted. Two exceptions to the doctrine must still be considered. First, it must be determined whether Congress intended to allow such state intervention in the labor field. Second, it is necessary to ascertain whether this legislation is an "interest deeply rooted in local feeling and responsibility."

D. Congressional Intent: Implications But No Guidance

The *Lodge 76* preemption line was constructed upon the premise that Congress intended to leave certain conduct unregulated. Congressional intent can be inferred from the unarticulated assumption that the state regulation of this conduct frustrates national labor policy. This interference, however, can be displaced by specific congressional intent not to preempt state action regardless of its effect on the labor policy.¹²⁹ Neither the

127. See generally *Lodge 76*, *IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. at 142-51.

128. Cf. *Local 20, Teamsters v. Morton*, 377 U.S. at 258 (Congress occupied the field by enacting section 303 of the LMRA). Indeed, the *Morton* court spoke in terms much broader than economic self-help weapons. "The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.'" *Id.* (quoting *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962)).

129. See, e.g., *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979), where despite the fact that the plurality found that the payment of unemployment benefits to strikers affected the balance of economic power during a strike, *id.* at 532, Congress, through the Social Security Act of 1935, 42 U.S.C. §§ 301, 501-04 (1976), implicitly intended to allow such state regulations. 440 U.S. at 527, 532, 544. The plurality was not content to rest its holding squarely on this implied intent and stressed the fact that the unemployment statute was a law of general applicability. *Id.* at 533. The decision consisted of

NLRA nor its amendments address the practice of replacing striking employees. The legislative history of the NLRA is similarly silent. There was, however, a tacit recognition by Congress that employers may permanently replace economic strikers, as evidenced by the fact that the Senate deleted language in a proposed bill that would have inhibited this practice.¹³⁰ While the conclusion drawn may be that the NLRA should not restrict the hiring of replacements, it does not necessarily follow that Congress also sought to preempt the states' power to regulate this conduct, particularly since some state strikebreaking statutes were enacted prior to the passage of the NLRA.¹³¹

Similarly, Congress failed to disclose any clear intent in resolving conflicts between state and federal authority when it passed the LMRA and the LMRDA. The legislative history of the LMRA amendments merely demonstrates the acceptance by Congress of the practice of hiring strikebreakers by acceding to the Supreme Court's earlier decision in *NLRB v. Mackay Radio* and subsequent NLRB decisions.¹³² Section 9(c)(3) of the LMRDA amended the LMRA to allow replaced economic strikers to vote with replacement workers in a representational election for as long as one year after the commencement of the strike.¹³³ In drafting this amendment, the legislators, as they had done under the LMRA, assumed employers

four opinions. While no single opinion received majority support, a majority of the justices agreed that legislative intent not to preempt was a significant factor.

130. S. 2926, 73d Cong., 2d Sess. (1934), originally provided that an individual employee who replaced a striking employee was excluded from the NLRA definition of an employee. While this provision implicitly recognized the employer's ability to replace strikers, it constricted that option by affording the replacement no statutory collective bargaining rights. This language was dropped in subsequent bills without explanation. The Senate debates suggest, from the proliferation of statements regarding the unfairness of this section to the replaced worker, that the Senate realized that there existed strong opposition to discrimination against replacements. See generally *To Create A National Labor Board: Hearings on S. 2926 Before the Senate Committee on Education and Labor*, 72d Cong., 2d Sess. (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 406 (1949).

131. See note 90 and accompanying text *supra*.

132. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 12 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 303 (1948), which states that since the Board has ruled that an employer may replace an economic striker, "[t]he bill writes the rule into the act." Interestingly, this bill allowed permanent replacement but excluded a "strikebreaker," a worker who only works for the duration of the strike, from the definition of an employee. *Id.*

The Senate committee, in considering a striking employee's right to vote in a representational election, reported that "strikers permanently replaced have no right to reinstatement (NLRB v. Mackay Radio, 304 U.S. 333)," S. REP. NO. 105, 80th Cong., 1st Sess., 25 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 431 (1948).

133. 29 U.S.C. 159 (1976).

could hire replacements without discussing the nature and scope of this right.¹³⁴ The legislative histories of the NLRA, LMRA, and LMRDA do not indicate that Congress has left this issue to the states.

Two other federal statutes are of special concern because they restrict the use of strikebreakers. The first is the Interstate Transportation of Strike Breakers Act of 1936 (Byrnes Act),¹³⁵ prohibiting the transport of strikebreakers recruited to obstruct peaceful picketing or other federally protected employee conduct by force or threats of violence. This legislation was passed to prevent the importation of armed and dangerous "thugs" by professional agencies, and ultimately to prevent violence.¹³⁶ There is no indication in the legislative history that states would be allowed to further restrict the use of strikebreakers. An argument can thus be made that if Congress thought it necessary to restrict the use of strikebreakers under other circumstances, it would have specifically done so.¹³⁷

The second statute affecting strikebreakers is the Federal Employment Service Act of 1933 (Wagner-Peyser Act).¹³⁸ Section 49j(b) of the Act provides that no person shall be referred by a state employment service to a position vacant due to a labor strike or lockout without notice of such dispute.¹³⁹ The Secretary of Labor, under his regulatory authority, has extended this by prohibiting employment offices from making any referrals where there is a labor dispute.¹⁴⁰ Two conflicting inferences may be drawn from these restrictions. The first is a negative inference that, by regulating only state employment offices, Congress intended to leave all other parties free from government restraints. The other inference is that, since Congress requires notice to replacement employees and authorizes the Secretary of Labor to restrict referrals by state employment agencies, Congress must have concluded that these restrictions were an acceptable interference with the national labor laws.¹⁴¹ These conflicting inferences render legislative intent equivocal on the issue of preemption. The statute's legis-

134. See generally S. REP. NO. 187, 86th Cong., 1st Sess., 31-33 (1959), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 427-29 (1959).

135. 18 U.S.C. § 1231 (1976).

136. See 74 CONG. REC. 6654, 10218-22 (1936); H.R. REP. NO. 2431, 74th Cong., 2d Sess. 1 (1936).

137. Cf. *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979) (express language providing for a specific remedy implies an intent to exclude all other remedies).

138. 29 U.S.C. § 49 (1976).

139. 29 U.S.C. § 49j(b) (1976).

140. 20 C.F.R. § 602.2(b) (1979). This was held to be within the statutory authority of the Secretary of Labor in *DiGiorgio Fruit Corp. v. Dep't of Employment*, 13 Cal. Rptr. 663 (1961).

141. While the Wagner-Peyser Act was enacted in 1933, two years before the NLRA, it

lative history is unenlightening, indicating merely that the probable purpose of section 49j(b) was to maintain governmental neutrality during a strike and to avoid sending unemployed workers to areas where, but for the strike, there was no actual shortage of competent manpower.¹⁴² It is doubtful that this rationale could authorize states, not concerned with federally funded public employment agencies, to control the use of strikebreakers among private parties.

In sum, the legislative histories of the NLRA, LMRA, and LMRDA support a congressional acceptance of the use of strikebreakers during labor disputes. There exists a strong inference that Congress intended to leave the practice unregulated. None of the statutes or their legislative histories, reviewed alone, support a contrary inference of congressional intent to allow states to act in this area.

E. Overriding State Interests in Support of Strikebreaking Statutes

The last hurdle that must be cleared in a preemption analysis is to determine whether state strikebreaking laws fall within the judicially created exception of "interests deeply rooted in local feeling and responsibility."¹⁴³ The Supreme Court in *Farmer v. Carpenter's Union*¹⁴⁴ set forth two factors to be examined in reaching such a determination. The first is whether the state's interest is a traditional concern of protecting its citizens from the conduct in question which may override any federal concern. The second is whether there is risk that the state action will interfere with the effective administration of national labor policy.¹⁴⁵ An important consideration in this second determination is whether there exists a conflict between state and federal administrative remedies.¹⁴⁶

The first factor—the presence of an overriding state interest—goes to the

can be argued that Congress could have repealed or modified this section if it had felt it would disrupt the free play of economic forces.

142. *A National Employment System: Hearings on S. 688, S. 1442, H.R. 4305 Before the Joint Committee on Labor*, 66th Cong., 1st Sess., 31 (1919) (statement by Secretary of Labor William Wilson). The Employment System bill was sponsored in Congress for a number of years before it was finally passed in 1933. In 1919, no bill contained the restrictive language on notice to replacements found in the final legislation. However, the hearings in the 66th Congress embody the clearest statement of the government's posture during a labor strike.

143. See text accompanying notes 84-87 *supra*. These laws do not fall under the category of rules of law so structured and administered as not to jeopardize federal interests. See note 77 and accompanying text *supra*. Here there is no rule of law which the state courts are seeking to review. Rather is it a law which, by its own terms, defines the permissible conduct of employers.

144. 430 U.S. 290 (1977).

145. *Id.* at 303-04.

146. *United Auto., Aircraft & Agricultural Implement Workers v. Russell*, 356 U.S. 634, 644-45 (1958).

heart of the "deeply rooted local feeling and responsibility" issue. The Supreme Court's best example of such responsibilities is the state interest in protecting the health and well-being of its citizens, which includes protection from physical injury, emotional distress, and damaged reputation.¹⁴⁷ The Court has also approved as overriding such concerns as protection of citizens from violence and threats of violence,¹⁴⁸ from breaches of the peace,¹⁴⁹ from obstruction of the highways,¹⁵⁰ and from destruction of property.¹⁵¹ If this is an all-inclusive list of local interests, as two justices have suggested,¹⁵² then the analysis of strikebreaking laws under this exception requires a simple determination of whether any of the enumerated categories are applicable. If this list is not exclusive, however, the Court has offered little guidance in how to identify other compelling state interests.

Various reasons have been advanced for the necessity of strikebreaking laws.¹⁵³ The one most often advanced, which on its face conforms to the list of Court-identified local interests, is that these statutes protect the public by preventing violence. Thus, in *Chamber of Commerce*, the state argued that the New Jersey statute was a legitimate exercise of the state's police power because it sought to prevent the violence that can occur when third parties are brought into a labor dispute.¹⁵⁴ Laws aimed at preventing

147. *Farmer v. Carpenters Local 25*, 430 U.S. at 302-303.

148. *Local 20, Teamsters v. Morton*, 377 U.S. 252 (1964); *Garner, Central Storage Co. v. Teamsters*, 346 U.S. 485 (1953).

149. *See Linn v. Plant Guard Workers Union*, 383 U.S. 53, 57 (1966); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957).

150. *Allen Bradley Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 664 (1953).

151. *Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 136 (1976).

152. *See New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979), "[t]he Court has not extended this exception beyond a limited number of state interests that are at the core of the States' duties and traditional concerns." *Id.* at 550 (Blackmun, J., concurring); the broad language in *Garmon* allowing state action in interests deeply rooted in local feeling and responsibility "has been applied only to a narrow class of cases." *Id.* at 560 (Powell, J., dissenting).

153. States might argue that the laws curtail violence and industrial unrest, embrace the public policy by condemning persons who profit from industrial strife, or protect the jobs of citizens of a municipality or state from persons outside the community or state and subsequently avoid community support of displaced employees in the form of welfare funds. *See Comment, supra* note 92, at 201-04.

154. *See Chamber of Commerce v. New Jersey*, No. L-21147-79, slip op. at 48 (N.J. Super. Ct. June 13, 1980). Indeed, the hiring of strikebreakers during the early years of industrial organizing usually precipitated violence. *See* note 100 *supra*. In *Illinois v. Federal Tool & Plastics*, 62 Ill. 2d 549, 344 N.E.2d 1 (1975), the state contended that the Illinois statute was aimed at violence caused both by the strikebreakers against strikers and by strikers against the strikebreakers. 62 Ill. at 554, 344 N.E.2d at 3-4.

violence or threats of violence, however, are to be distinguished from laws aimed at preventing potential violence. In *Garner, Central Storage*, the Court held that picketing could not be enjoined merely because it created a potentially violent and disruptive situation; there must be actual violence or obstruction.¹⁵⁵

Strikebreaking statutes are not merely aimed at preventing violence or threats of violence; these laws usually sweep broadly, prohibiting the solicitation or hiring of replacements, or requiring notice to replacements under all conditions and circumstances.¹⁵⁶ As one court noted, striking down a statute aimed at both employers and third parties, "[t]he statute's prohibition would reach replacements even when hired in the peaceful exercise of the employers [*sic*] right to maintain a balance of power with the employees [*sic*] union."¹⁵⁷ The desirability of maintaining this balance suggests that states cannot prohibit the solicitation or hiring of replacements, nor can they require notice to replacements in every instance under the pretense of preventing violence. Since prevention of inherent or merely potential violence is not a legitimate state concern for the purposes of preemption, these statutes will survive preemption only if narrowly drafted to prohibit real or imminent violence or threats of violence, unless the courts are willing to expand the list of local interests.

Another "overriding" state interest advanced is the need to safeguard community jobs from persons outside the community or the state.¹⁵⁸ This may fit under either the broad category of protecting the health and well-being of the public at large or protecting the property rights of employees in their jobs.¹⁵⁹ But its effect is to protect the economic status of the strikers. Moreover, these statutes are overbroad in that they make no distinction between hiring permanent or temporary replacements, although some distinguish between in-state and out-of-state solicitation.¹⁶⁰ If an em-

155. 346 U.S. at 488. *Accord*, *Street, Elec. Ry. & Motor Coach Ass'n v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951); *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) (peaceful picketing is protected self-help under the Railway Labor Act).

156. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 149, §§ 22, 22A (West 1953); N.J. STAT. ANN. § 34:13 C-1(c) (West 1965); OKLA. STAT. ANN. tit. 40, § 167 (West 1951). The New Jersey strikebreaking statute, to survive preemption, should be given a narrow construction limiting its applicability "to situations in which a significant risk of violence is inherent." Brief for Defendants at 16, *Chamber of Commerce v. New Jersey*, No. L-21147-79 (N.J. Super. Ct. June 13, 1980) (oral decision).

157. *See* *Chamber of Commerce v. New Jersey*, slip op. at 49.

158. *See* note 153 *supra*.

159. *See* text accompanying notes 147-51 *supra*.

160. *See* note 96 and accompanying text *supra*.

ployer hired only temporary replacements, community members would retain their employment.

Finally, the objective of condemning persons who profit from industrial strife¹⁶¹ has also been suggested as an overriding state interest. But unlike other state interests which motivate a state to indirectly enter the bargaining arena to protect those independent interests, this interest directly attacks the role of the parties in a labor dispute for its own sake. There is not an independent local concern which can be separated from the actual interference with the bargaining process. Furthermore, a state's disapproval of collective bargaining "warfare" is misplaced since Congress has determined that the potential for industrial strife is an integral part of our national labor policy.¹⁶² To permit a state to condemn one party to a dispute in the name of overriding state interest is to permit that state to frustrate the foundations of the national labor policy. Surely this contradicts the intent of Congress.

The third category of state strikebreaking statutes—the notice statutes—presents an additional state interest. While holding that such a statute was preempted, the Illinois Supreme Court in *Illinois v. Federal Tool & Plastics* conceded the existence of an important state concern for preventing fraud and promoting truth in advertising.¹⁶³ The court nonetheless held that the notice statute was preempted.¹⁶⁴ Relying on *Morton*, the court said the statute impinges on the bargaining process and upsets the balance struck by Congress.¹⁶⁵ The court's reasoning is sound but stops short of the full preemption analysis. There is no attempt to identify the nature of the overriding state interests exception and to determine whether truthful advertising might conform to these interests.¹⁶⁶

161. See note 153 *supra*.

162. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04 (1970) ("agreement might in some cases be impossible, and it was never intended that the Government would in such a case step in . . . and impose its own views of a desirable settlement"); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965) ("the act also contemplated resort to economic weapons should more peaceful measures not avail"); *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 488-89 (1960) ("the parties . . . still proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system.").

163. 66 Ill. 2d at 554, 344 N.E.2d at 3-4. The court also identified legitimate interests of protecting against potential abuse and obloquy against replacements and their families and against potential violence.

164. 62 Ill. 2d at 554, 344 N.E.2d at 4.

165. *Id.* at 554-55, 62 N.E.2d at 4-5.

166. The Illinois court suggests, in dicta, that it is dismissing the local interest question because the state notice statute is not one of general applicability. See text accompanying notes 78-83 *supra*. The court quotes a segment of Professor Cox' preemption article which

A full examination of the overriding local interests exception may have led the Illinois Supreme Court to a contrary result. Just as a state may act to redress actual violence or threats of violence, so too may it act to redress fraud or untruthful advertising to foster free, knowledgeable choices. Although truth in advertising is distinguishable from the important local interests previously identified as acceptable, this does not minimize its importance.¹⁶⁷ States have a substantial interest in assuring that even truthful advertising is communicated to the public accurately and fully,¹⁶⁸ and the public has a concurrent interest in receiving a free flow of undistorted commercial information.¹⁶⁹ The state's concern for the free flow of truthful information is an overriding interest no less vital than its concern for the protection of its citizens against libel and trespass.

In addition to identifying overriding state interests, the Supreme Court has stated that preemption will be avoided only where there is minimal risk that state and federal remedies would conflict, and thus minimal interference with the effective administration of the federal labor policy.¹⁷⁰ In regulating employers through notice statutes, the state's focus is on the employers' conduct in recruiting replacements. In contrast, the NLRB asserts jurisdiction only after the replacements have been assimilated into the employer's workforce.¹⁷¹ The NLRB has no authority to regulate the employer's relationship among persons not considered "employees" under the

states that Congress has sanctioned state laws which apply to the general public without regard to whether they are employers, employees, or labor organizations. 62 Ill. 2d at 555, 344 N.E.2d at 4 (quoting Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1355-56 (1972)).

167. See text accompanying notes 147-51 *supra*. In *Farmer v. Carpenters Local 25*, 430 U.S. 290, the Court stated that it was not "the history of the tort at issue, but rather . . . the state's interest in protecting the health and well being of its citizens." *Id.* at 303.

168. Cf. *Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (commercial advertising by optometrists). If truthful advertising is nonetheless misleading, a state faces no obstacle in alleviating this deception. *Id.* at 16. See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976) (first amendment does not prohibit states from "insuring that the stream of commercial information flows cleanly as well as freely"). Cf. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 150 (1963) (states have traditional powers to protect their citizens from deceptive advertising of food products).

169. Cf. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 763 (consumers have a strong interest in free flow of information).

170. See text accompanying note 145-46 *supra*. While we have already determined that notice statutes frustrate federal labor policy, the key inquiry here is whether, when state and federal governments provide remedies, the risk of interference is at a minimum.

171. See, e.g., *Pacific Tile & Porcelain Co.*, 137 N.L.R.B. 1358 (1962) (replacements treated as permanent employees for purposes of voting in representational elections); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963) (superseniority granted to replacement workers violated section 8(a)(3) of the LMRA).

Act.¹⁷² There is some risk that threat of prosecution under a strikebreaking notice statute may inhibit some employers or third parties from recruiting replacements. Absent a vague or ambiguous statute, however, it is doubtful that an employer would forgo hiring replacements due to a fear of issuing a notice. Thus, the slight risk is acceptable in light of the substantial state interest involved.¹⁷³

In summary, if the Supreme Court has exhausted the list of interests "deeply rooted in local feeling and responsibility," then a state's concern for truthful advertising will not exempt notice statutes from preemptive displacement. However, the importance of full and accurate information by which workers can make informed decisions militates against such a stringent application. Courts need only extend the interpretation of interests deeply rooted in local concern slightly to encompass strikebreaking notice statutes. Lastly, these statutes pose little risk of interference with the effective administration of the federal labor policy.

III. CONCLUSION

State strikebreaking laws must be subjected to a federal preemption analysis. They focus on the very heart of the collective bargaining process by regulating an employer's economic self-help weapons. The hiring of replacements during a strike is considered a legitimate means for an employer to operate his business and combat union economic pressures. Prohibiting employers and third parties from recruiting and hiring replacements upsets the balance between the employer and the union, and therefore frustrates national labor policy. Statutes which so prohibit employers and third parties will not withstand judicial scrutiny and will fall under the preemption doctrine.

In contrast, strikebreaker notice statutes, although frustrating the effective administration of federal labor policy by upsetting the economic balance between labor and management, serve a compelling local interest in accurately and fully informing the public. These statutes are properly excepted from the preemption doctrine as laws regulating "interests deeply rooted in local feeling and responsibility."

Frank Martorana

172. See 29 U.S.C. § 151 (1976), which defines "employees" under the Act.

173. See *Farmer v. Carpenters Local 25*, 430 U.S. at 303-04 (state interest in protecting its citizens from infliction of emotional distress outweighed the slight risk of the state touching on a claim of discrimination in hiring hall referrals, an unfair labor practice under the act).

